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No. 83-2060 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

BOB A. CLAPPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly denied petitioner's request for a bench trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 732 F.2d 1148. The opinion of the district court (Pet. App. 15a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1984. A petition for rehearing was denied on May 10, 1984 (Pet. App. 12a). The petition for a writ of certiorari was filed on June 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on 13 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in

violation of 18 U.S.C. 371. He was sentenced to concurrent terms of two years' imprisonment on eight of the counts and sentenced to concurrent terms of probation for three years on the remaining counts, the probation to run consecutively to the imprisonment. He was also fined $1,000.[1]

1. The evidence is summarized in the opinions of the courts below (Pet. App. 3a-4a, 16a-25a). It showed that petitioner and co-defendant Robert T. Powell, together with unindicted co-conspirators Robert Outeda and George Stoss, fraudulently obtained and cast absentee ballots at a May 15, 1979, primary election, a November 6, 1979, general election, and a May 19, 1981, primary election in Luzerne County, Pennsylvania. The evidence included testimony from co-conspirators Outeda and Stoss, testimony from the persons represented to be the voters, recorded conversations between Stoss and petitioner, and expert testimony that petitioner's fingerprints were found on voting materials.

Prior to the May 15, 1979, primary election, Outeda obtained signatures from residents of the Hoskins Rest Home on applications for absentee ballots. He then gathered the ballots when they arrived at the home and turned them over to petitioner, a county political leader. Later, at petitioner's direction, Outeda obtained signatures from the residents on the voter declaration on the envelope in which each completed absentee ballot is mailed. Outeda returned the envelopes to petitioner, and then they were sent to the Election Bureau. The residents only signed the declarations and never saw the ballots. Pet. App. 18a-20a.

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[1]Petitioner was acquitted by the jury on five other substantive counts of mail fraud. Co-defendant Robert T. Powell was also convicted on one count of conspiracy and five substantive counts of mail fraud. This was their second trial. At the first trial, the court declared a mistrial as a result of a deadlocked jury.

Before the November 6, 1979, general election, at petitioner's direction, Outeda again obtained signatures from two residents of the rest home on applications and personally signed three other applications, attesting that the applicants were unable to sign because of illness or physical disability. Co-defendant Powell notarized all five applications. The Election Bureau sent five absentee ballots addressed to the five residents. They were returned with signatures on the declarations on the envelopes. All five residents testified that they never saw, marked, or mailed the ballots and denied having the disabilities attested on the applications. Pet. App. 20a-21a.

Before the May 19, 1981, primary election, at petitioner's direction, Stoss obtained applications from two residents of a low-income housing development. After the ballots were mailed, petitioner instructed Stoss to make sure these two residents voted for the people on his party's ticket. After Stoss followed these directions, petitioner reviewed the two marked ballots, which were later sent to the Election Bureau. Both voters were in fact capable of getting to the polls on Election Day and thus were ineligible to vote by absentee ballot. Pet. App. 22a-23a.

2. Prior to trial, petitioner and his co-defendant filed a motion to waive their right to a jury trial, pursuant to Fed. R. Crim. P. 23. The government consented to the motion. The district court denied the motion. In denying the motion, the court observed that the issues in the case "were not complex" and that the evidence to be presented was not inappropriate for the jury to consider. The court observed that the verdict would depend, in large part, on "[s]erious credibility evaluations" and that resolution of the questions of credibility "was best left to a jury of twelve." Pet. App. 31a.

On appeal, the court of appeals determined that the district court had not abused its discretion in denying the motion for bench trial. Pet. App. 6a-7a.

ARGUMENT

Petitioner contends that the trial court erred in refusing to grant him a bench trial after he and his co-defendant waived a jury trial and the government consented to a non-jury trial. He argues that, under Fed. R. Crim. P. 23(a), prejudicial pretrial publicity, the complexity of the case, and the admission of evidence of his prior conviction required the court to approve his request for a non-jury trial. The courts below properly rejected this contention.

1. The court's refusal to approve the attempted waiver of a jury trial was in full accord with Fed. R. Crim. P. 23(a), which provides that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." See *Singer* v. *United States*, 380 U.S. 24 (1965); *United States* v. *Moon*, 718 F.2d 1210, 1217-1219 (2d Cir. 1983), cert. denied, No. 83-1242 (May 14, 1984); *United States* v. *Houghton*, 554 F.2d 1219, 1226 (1st Cir.), cert. denied, 434 U.S. 851 (1977); *United States* v. *Morlang*, 531 F.2d 183, 186-188 (4th Cir. 1975); *United States* v. *Wright*, 491 F.2d 942, 945 (6th Cir.), cert. denied, 419 U.S. 862 (1974); *United States* v. *Farries*, 459 F.2d 1057, 1061 (3d Cir. 1972), cert. denied, 410 U.S. 912 (1973); *United States* v. *Ceja*, 451 F.2d 399 (1st Cir. 1971); *United States* v. *Abrams*, 357 F.2d 539, 549-550 (2d Cir.), cert. denied, 384 U.S. 1001 (1966).

As then Judge Burger wrote for the court in *Dixon* v. *United States*, 292 F.2d 768, 769 (D.C. Cir. 1961): "three entities, the accused, the government and the court must concur before any criminal trial may be held without a jury." A trial court therefore is under no obligation to serve as factfinder in a case where, as here, it decides "that the

credibility resolution [is] best left to a jury of twelve" (Pet. App. 31a).

Petitioner's assertion (Pet. 7) that "the 'approval' of the Court should be limited to a determination of whether there is a knowing and intelligent waiver of jury trial by the Defendant" is totally unsupported by precedent and would render Rule 23(a)'s requirement of court approval superfluous. Since the court already, under the Rule, is under an obligation to determine whether the defendant has waived the jury trial right, there is no reason to construe the court's independent power to approve or disapprove as limited to making that determination. Rather, the motion for a bench trial is entrusted to the sound discretion of the district court and, as the court of appeals recognized (Pet. App. 6a-7a), can be overturned by an appellate court only for an abuse of that discretion. See *Singer*, 380 U.S. at 24 (emphasis added) (waiver of the right to a jury trial is conditioned on "the consent of the prosecuting attorney *and* the trial judge"; "if *either* refuses to consent, the result is that the defendant is subject to an impartial trial by jury").

2. Petitioner does not expressly claim that his constitutional due process rights were violated by the denial of his motion for a bench trial. There is, therefore, no reason to address that issue. In any event, there is no basis for any claim of a constitutional violation here.

We begin with the proposition that "[a] defendant's only constitutional right concerning the method of trial is to an impartial trial by jury." *Singer*, 380 U.S. at 36. See also U.S. Const. Art. III, § 2 ("[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"). There is no independent constitutional right to trial by the court. Here, both courts below found that the jury was capable of rendering a fair and impartial verdict. There is no reason for this Court to engage in further review of that factbound issue.

The claim that the jury could not be impartial because of public hostility was resolved definitively against petitioner during the voir dire of prospective jurors. See *United States* v. *Moon*, 718 F.2d at 1218; see also *Patton* v. *Yount*, No. 83-95 (June 26, 1984). A total of 12 veniremen for the panel (15 Tr. 20-63) and six for the four alternate positions (15 Tr. 100-120) indicated some awareness of publicity about the case. The court questioned them individually and excused the 3 veniremen that petitioner and his co-defendant challenged for cause (15 Tr. 33, 63, 104). Petitioner thus has no colorable claim of partiality because of pretrial publicity. See *Murphy* v. *Florida*, 421 U.S. 794 (1975); *United States* v. *Morlang*, 531 F.2d at 186-188.

Nor did the jurors' impartiality become suspect because two jurors began their discussion of the case prematurely (after all the evidence had been received but prior to the closing arguments). Upon the defendants' motion for mistrial, the district court conducted a voir dire examination, removed the two jurors who had been identified as speaking, and substituted alternates (4 Tr. 27-85). This occurrence in no way indicated that the remaining jurors were not able to render an impartial verdict based upon the evidence.

The contention that the case was too complex to be tried by a jury is an argument that has been consistently rejected by the courts of appeals, in circumstances far more complex than these. See, *e.g.*, *United States* v. *Wright*, 491 F.2d at 945; *United States* v. *Abrams*, 357 F.2d at 549. Whether petitioner fraudulently obtained and used absentee ballots and caused the mail to be used in mailing certain election material raises questions of a sort jurors frequently decide without difficulty. And, as the court below noted (Pet. App. 7a), the issues were simplified at trial by the parties' stipulation regarding the Pennsylvania Election Code.

The fact of petitioner's prior state conviction, which was brought out by petitioner's attorney during his direct examination (3 Tr. 157-159), also did not make a jury trial unfair. There is no reason to believe that the jury in this case was not able to follow the court's instruction (4 Tr. 99) and use this evidence, as juries commonly do, solely to determine credibility. See Fed. R. Evid. 609.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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